NO. 21686
NO. 21686-A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellant.

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' BRIEF

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I

JURISDICTION

Appellants were indicted by the federal Grand Jury in and for the (then) Southern District of California on August 3, 1966, in two counts alleging violations of 21 U.S.C. §174; appellant Romero was charged in both counts; appellant Tickle was charged only in count two.

Appellants were arraigned, pleaded not guilty, made pretrial motions, were tried without a jury before the Honorable Albert Lee Stephens, Jr. On October 26,

1966, appellant Romero was found guilty on both counts, and on November 14, 1966, Romero was sentenced to fifteen years imprisonment. On November 14, 1966, appellant Tickle was found guilty on count two, and on December 12, 1966, Tickle was sentenced to five years imprisonment. Appellants made posttrial mostions. On November 14, 1966, appellant Romero filed his Notice of Appeal; on December 20, 1966, appellant Tickle filed his Notice of Appeal.

The United States District Court for the Southern District of California had jurisdiction of the cause of action under 18 U.S.C. §3231. This court has jurisdiction under 28 U.S.C. §1291 and §1294(1).

II

STATEMENT OF THE CASE

On May 10, 1966, appellant Romero was arrested by agents of the Federal Bureau of Narcotics without a warrant of arrest.

On May 10, 1966, after Romero's arrest, federal agents secured and executed a search warrant on appellant Tickle's home [C.T. 50-52].1/

1/ C.T. refers to Clerk's Transcript.

On May 10, 1966, federal agents arrested Tickle at his home without a warrant of arrest [C.T. 58, line 12].

On May 11, 1966, a complaint was filed before the United States Commissioner charging Tickle with receiving two ounces of heroin on May 10, 1966 [C.T.11].

On May 11, 1966, Tickle was arraigned before the United States Commissioner and released on a $2,500 personal surety bond [C.T. 10].

On May 11, 1966, a complaint was filed before the United States Commissioner charging Romero with receiving fourteen grams of heroin on May 10, 1966 [C.T. 13].

On May 11, 1966, Romero was arraigned before the United States Commissioner and released upon the posting of a $10,000 bail bond [C.T. 12].

On August 3, 1966, appellants were indicted in a two-count indictment in which: Romero alone was charged in count one with having received, concealed and facilitated the concealment and transportation of 6.5 grams of heroin on May 10, 1966; and both appellants were charged in count two with having received, concealed and facilitated the concealment and transportation of 19.4 grams of heroin on May 10, 1966 [C.T. 2-3].

On August 3, 1966, upon the filing of the

indictment, the court was requested and did issue warrants of arrest for the appellants and increased bail for Romero to $35,000 and for Tickle to $15,000; both appellants were arrested on these new warrants [C.T. 14-16].

On August 4, 1966, the government moved to reduce Tickle's bond from $15,000 to a $2,500 personal surety bond and the court so ordered [C.T. 5-7].

On August 5, 1966, Romero moved to reduce his bond; the motion was denied [C.T. 71].

Between the appellants' arrests and their indictment, there was no preliminary hearing; it was continued several times [C.T. 10 and 12].

On August 15, 1966, appellants were arraigned in the United States District Court; the court entered a plea of not guilty for them and set the case for trial on September 12, 1966 [C.T. 70].

Prior to trial, appellants moved for discovery and inspection [C.T. 18-23]; to suppress the evidence [C.T. 24-29]; and for severance [C.T. 30-34].

On October 5, 1966, the court ordered the appellants be severed for trial [C.T. 146].

On October 12 and 13, 1966, the court heard appellants' motions to suppress the evidence [C.T. 133];

the court denied the motions [R.T. 257].[2/]

On October 13 and 14, 1966, Romero was tried by the court without a jury; and on October 26, 1966, the court found Romero guilty of both counts [C.T. 156].

On October 27, 1966, Tickle was tried by the court without a jury [C.T. 181] and on November 14, 1966, the court found Tickle guilty on count two [C.T. 182].

On November 14, 1966, Romero admitted a prior federal narcotics conviction and was sentenced to imprisonment for fifteen years on each count, to run concurrently [C.T. 174-175]; Romero filed his Notice of Appeal the same date [C.T. 177, 184].

On December 12, 1966, Tickle was sentenced to five years imprisonment [C.T. 183]; Tickle filed his Notice of Appeal on December 20, 1966 [C.T. 185].

III

STATEMENT OF FACTS

A. Preliminary Statement.

The appellants were jointly indicted, made joint pretrial motions, and had joint pretrial hearings; but they were tried separately. Romero's trial without a jury followed immediately behind a joint two-day motion

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2/ R.T. refers to Reporter's Transcript.

to suppress the evidence, which was denied. Tickle was tried two weeks later by the same court without a jury.

B. Over-all Chronology.

In the fall of 1965, an unknown person named Juan Sanchez wrote three letters in Spanish and sent them to the Federal Bureau of Investigation, who in turn sent them to the Federal Bureau of Narcotics [R.T. 63-69]. One of these letters is dated September 23, 1965, and two are dated November 25, 1965 [R.T. 63-69] The author of these letters was and is totally unknown [R.T. 69, 141]. These letters are anonymous, but they made allegations about Romero. The letters comment on certain historical facts relative to Romero, and then allege narcotics activity [R.T. 69-72, 75-78].

Upon receipt of these anonymous letters, the Federal Bureau of Narcotics initiated an investigation of Romero [R.T. 78] that included a check of Romero's long distance telephone calls, and learned that a number of calls were made from a telephone registered to Mrs. Romero to a telephone in the home of Tickle (a relative by marriage of Romero's) [R.T. 114]. Commencing in December of 1965 until the arrests in May of 1966, the agents conducted surveillance of Romero in excess of thirty times [R.T. 81-83]. The agents

also received some hearsay information from an unestablished chain of speakers that Romero was in touch with a person who had a narcotics conviction [R.T. 89-91].

On May 10, 1966, at least seven agents were surveying Romero [R.T. 93]; Romero was seen entering Tickle's home at about 5:20 P.M. [R.T. 92]; Romero left at about 6:10 P.M. [R.T. 93]; three cars of agents followed Romero; one agent only testified that he saw Romero enter a previously unsearched public telephone booth and leave without making a call [R.T. 168-170]. The testifying agent entered the booth and found a packet of brown powder, gave a signal to other agents, who then gave chase to Romero, who was in his car, and they caught, beat and arrested Romero a few blocks away [R.T. 171].

A bleeding Romero was given some kind of a warning and taken to a gas station [R.T. 222]. According to agents, Romero wished to speak to the agent in charge and when this was done Romero told him that there were narcotics in Tickle's home [R.T. 222].

An agent who was at the scene of Romero's arrest then went to downtown Los Angeles, met an Assistant United States Attorney, arranged for the presence of an United States Commissioner, executed an affidavit for a search warrant of Tickle's home, in

which he included statements allegedly made by Romero after being arrested, presented his papers to the United States Commissioner at his office, got a search warrant and then returned to join the other agents who were in the field still holding Romero [R.T. 95, 96].

Romero had not been taken before the United States Commissioner; he was held a prisoner by the agents [R.T. 98].

The agents arrived with a search warrant, then searched Tickle's home, found nothing, brought Romero into Tickle's home, and Romero allegedly showed the agents some heroin concealed in Tickle's home [R.T. 99]. The agents then arrested Tickle [R.T. 390].

The next day, May 11, 1966, after a night in custody, Romero and Tickle were arraigned before the United States Commissioner [C.T. 10].

On August 3, 1966, appellants were indicted and the government asked for and received warrants of arrest for both men and increased their bail [C.T. 14-
On August 3 and 4, 1966, the federal agents secured a confession from Tickle in the absence of any counsel [R.T. 400]. In the process of obtaining this confession, the federal agents arranged to have the government attorneys move to reduce Tickle's new bail, which he could not make, to the former personal security bail,

which he could make, and when his confession was signed, this reduction in bail was accomplished solely by the government attorney in the court [C.T. 5-7] [R.T. 529]. This confession was admitted into evidence over objection [R.T. 602].

IV

SPECIFICATION OF ERRORS

A. Errors as to Romero.

1. Romero's arrest without a warrant was illegal as it lacked the prerequisite probable cause [C.T. 24-29].

2. Romero's statements after his arrest are not admissible into evidence and should have been suppressed as said statements were obtained in violation of Romero's constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, and said statements were not voluntary and said statements were obtained during a period of "unnecessary delay" under Rule 5(a) Federal Rules of Criminal Procedure [C.T. 24-29] [R.T. 98,100].

3. There is insufficient evidence to support a conviction of Romero on count one of the indictment [C.T. 159].

4. The search warrant is invalid and any evidence obtained pursuant to it should be suppressed

as it does not set forth probable cause and it contains constitutionally inadmissible statements of Romero [C.T. 24-29] [R.T. 98,100].

5. Romero's statements at Tickle's home were obtained in violation of his constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, and they are not voluntary statements, and they were obtained during a period of unnecessary delay pursuant to Rule 5(a) Federal Rules of Criminal Procedure [C.T. 24-29].

6. There is insufficient evidence to support a conviction of Romero on count two of the indictment [C.T. 159].

B. Errors as to Tickle.

1. There is insufficient evidence to convict Tickle on count two of the indictment [R.T. 602].

2. The search warrant for his home fails to set forth probable cause and any evidence taken from his home should be suppressed [C.T. 24-29].

3. The confession obtained from Tickle was obtained in violation of his constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution [R.T. 602].

V

SUMMARY OF THE ARGUMENT

A. There was no probable cause to arrest Romero without a warrant.

B. Romero's statements at the time of his arrest are not admissible into evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a prior proper constitutional warning; and they were obtained during a period of unnecessary delay.

C. There is insufficient evidence to support a conviction of Romero on count one of the indictment.

D. The search warrant is legally invalid as it does not set forth probable cause; it is also invalid as it uses the statements of Romero that are inadmissible; it is also invalid as it is the fruit of the poisonous tree.

E. Romero's statements and actions at Tickle's home during the search by agents of Tickle's home are not admissible into evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a prior proper constitutional warning; and they were obtained during a period of unnecessary delay.

F. There is insufficient evidence to support a conviction of appellants on count two of the indictment.

G. The search warrant for Tickle's home is legally invalid as to Tickle.

H. Tickle's confession was obtained in violation of his constitutional rights in that: it was obtained by a denial of due process and fair play; it was obtained by denying him his right to counsel; it was the product of an illegal search of his home.

VI

ARGUMENT

A. Romero's arrest without a warrant lacked probable cause and is an illegal arrest.

Even though the federal agents had been actively investigating Romero for some six months, he was arrested on the evening of May 10, 1966, without a warrant of arrest. The government has the burden of proving that they had probable cause to arrest Romero.

Probable cause exists where the facts and circumstances within the agents' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable

caution to believe that an offense has been committed or is being committed.

Beck v. Ohio, 379 U.S. 89 (1964);

Draper v. U.S., 358 U.S. 307 (1959).

Procedurally, the first issue is what can be considered as evidence of probable cause in this case. Appellants moved to suppress the evidence [C.T. 24-29] and the government filed an opposition to this motion [C.T. 46-60]. Attached to the government's opposition was a lengthy affidavit of Agent Lipschutz [C.T. 54-59]. Is this affidavit admissible on this issue of probable cause to arrest? In the trial court, Romero's attorney (not his present appellate attorneys) advised:

> "Your Honor, this hearing, insofar as the defendant [Romero] is concerned, is not being submitted on the basis of the affidavits. We want some sworn testimony here. It's the defendant's position that where there is no search warrant and where there is no warrant of arrest, the burden is on the government to show probable cause. And they can't do that by the mere submission of affidavits.
> THE COURT: If the court desires, then I will put on evidence concerning ...

MRS. DUNNE: Yes, sir." [R.T. 59-60]

Thus, all that can be considered by this court as to whether or not the government established that it had probable cause to arrest Romero is the sworn testimony in court at the hearing on the motion to suppress.

The government's evidence as to probable cause to arrest Romero on May 10, 1966, without a warrant consists of the following:

1. Three letters, written in Spanish, from an unknown, basically anonymous person that the government had never before heard of or from and whom the government was unable to identify or locate. These letters were not even sent to the Federal Bureau of Narcotics. One letter is dated September 23, 1965, and two bear the date November 25, 1965 [R.T. 63-69]. These letters allege that Romero is engaged in narcotics activities, and then provide identifying information about Romero such as his telephone number, that he had been a prisoner at McNeil Island, that in mid-November, 1965, he finished a detention period, and that his wife had been in an accident in Mexico. The agents verified this identifying information [R.T. 69-77]. These letters also allege that a Manuel Areyano is used by Romero to transport narcotics into the United States [R.T. 72]. The agent learned that a Manuel Areyano "was of record"

with Customs as a "suspect" [R.T. 72], whatever this means.

Some four months later, March 21, 1966, while the agents had Tickle's residence under surveillance, there were two cars at Tickle's home; and by tracing the license plates the agents determined that the vehicle with the Sonora, Mexico, plates was registered to Juana Arrelanes, the wife of Romero, and the vehicle with the California plates was registered to Manuel Arrellanes [R.T. 74-75, 107-108]. The agents acted on the basis that the Areyano named in the anonymous letters, written in Spanish, is one and the same person as the Arrellanes to whom a car is registered, in spite of the obvious fact that the names are quite different and that Romero's wife's name was Arrellanes. But even so, what does this add up to? Nothing more than a possibility on top of a suspicion; it certainly doesn't begin to be probable cause that Romero has committed a crime.

2. The agents obtained from the telephone company the list of telephone numbers that were called from a telephone in Romero's home [R.T. 79]. For at least six months prior to Romero's arrest, the agents secured such information and (without records presented in court) the agent testified that many calls were made to Mexico and many calls were made to Tickle [R.T. 79].

Once again, we must ask what does this prove? The agents knew that Romero was married and his wife has a car registered in Mexico and that she was in an automobile accident in Mexico; and further, that Tickle is related by marriage to Romero, and that the house that Tickle and his wife were living in was owned by Romero [R.T. 73, 75, 77, 114].

The agent obviously overstated his information when he said: "I also determined that Mr. Romero was calling individuals, who are of record in our office file, who have been convicted on narcotic violations." [R.T. 80] What he means is that the telephone in Mr. Romero's home was used to call a telephone number that is registered to some individual who had a narcotics conviction. Who made the call, who answered the call, who spoke to whom, and the subject matter of the conversation is totally unknown to the agents. They did <u>not</u> tap or monitor Mr. Romero's telephone, and they did not witness anyone using the telephone in Mr. Romero's home; so they just can't honestly state: "Mr. Romero was calling individuals, etc." It is this kind of overstatement or exaggeration that can mislead a court into deciding that what is actually mere suspicion constitutes probable cause.

3. During the four months prior to Romero's

arrest, the federal agents had him under surveillance "in excess of thirty times" [R.T. 82], and conducted some sort of financial check on his assets [R.T. 84]. This, of course, has no direct bearing on the issue of probable cause, but it does point out that the agents were spending a great amount of time secretly watching and following Romero and coming up empty; they did not see him commit an illegal act of any kind, nor did they obtain any evidence of any wrongdoing by Romero. This kind of activity can, of course, cause a suspicious agent to become quite frustrated and may explain over-statements, exaggerations, and over-eagerness.

4. During the four months prior to Romero's arrest, the surveying agents saw Romero visit Tickle's residence on some ten to fifteen occasions [R.T. 85]. The fact that Romero and his family are related to Tickle and his family, and that Romero is Tickle's landlord can not be discounted in weighing this innocent activity.

5. Five months prior to Romero's arrest, in December of 1965, Agent Lipschutz was advised that Romero and Tickle had been in Oakland near the residence of an ex-convict named Toliver, who had served time with Romero [R.T. 89-90]. Romero's trial counsel moved to strike this testimony and it was denied.

There was even allowed into the record that an informant in Oakland gave information to agents in San Francisco who telephoned it to Los Angeles that Toliver received narcotics from Romero [R.T. 90-91]. This is the rankest form of prejudicial inadmissible hearsay: an unidentified informant of unknown reliability who probably had no firsthand knowledge of anything talking to an agent at an unknown time or place and some time subsequently having the agent telephone it to another agent. It is doubtful that this could even form a basis for a reasonable suspicion, not to mention probable cause.

This, then, is the sum total of the agents' "knowledge" prior to May 10, 1966. Even the government does not contend that this constitutes probable cause that Romero committed a crime. In fact, as of this time, there is no evidence that a crime had been committed. Probable cause does not stand alone; it must be utilized in connection with a specific offense. Suffice it to say that as of May 10, 1966, the agents, at the most, were suspicious of Romero. They had expended some six months of investigation and had nothing. Could it possible be that there was nothing to have?

6. On May 10, 1966, at least seven federal agents were surveying Romero [R.T. 93, 119]. Why?

Was this any different than the prior thirty surveillances? Did the agents have any reason to believe that this day was to be different? Was there another informant involved - or the same informant in Oakland? The court sustained the government's objection to this line of inquiry [R.T. 123].

The agents saw the following events on the evening of May 10, 1966: At about 5:20 P.M., Romero entered Tickle's residence; Tickle was never seen; at about 6:10 P.M., Romero left Tickle's residence, entered his car alone and drove away with three federal cars in pursuit; Romero parked his car, left his car and walked across two streets [R.T. 92-94, 125-131]. Although there were seven agents in three different vehicles on the scene, only one agent saw the next series of events and he, Agent Downing, was the only one to testify about these events.

Agent Downing testified that he saw Romero walk across two streets and enter a single public telephone booth [R.T. 168]; that he, Agent Downing, was forty to forty-five yards from the telephone booth and across the street from the booth [R.T. 178]; that he had a sort of profile view of Romero in the booth [R.T. 168]; that he did not see Romero pick up the telephone receiver or deposit a coin or look in the

telephone book [R.T. 169]. Agent Downing testified on direct examination that Romero, while in the phone booth, did the following:

"Q. Would you tell us what he did?

A. I couldn't see that he did anything, really. I could see his hands move but I couldn't tell what he was [doing].

Q. Could you say what you observed his hands to do?

A. Really, I couldn't tell what they were doing.

Q. Which direction did they move?

A. They were in front of him.

Q. Did they reach up or below the phone?

A. They were about -- raised high, I would say, at the bottom of the phone.

Q. At the bottom of the phone.
How long was he in the phone booth?

A. Just a few seconds." [R.T. 169-170]

On cross examination, Agent Downing testified:

"Q. You state that you saw the defendant Romero go into the phone booth and do something with his hands or have -- carry his hands in some manner?

A. That is correct. I couldn't tell what

he was doing from that distance.

Q. In other words, he wasn't necessarily doing anything with his hands, was he, sir?

THE COURT: Let's have the witness resume the stand.

THE WITNESS: I am sorry.

THE COURT: Go ahead.

BY MR. SHERMAN:

Q. I will re-ask the question.

In other words, Agent Downing, you didn't see him do anything with his hands?

A. From what I saw, I could not state what he did with his hands." [R.T. 178]

The court, a few moments later, was called upon to rule concerning an aspect of Agent Downing's testimony, and in so doing summarized as follows:

"THE COURT: So, we know what happened. Whatever this witness says is that he walked -- all he has testified to is he saw Mr. Romero enter the phone booth. And he could not see what he did with his hands, but he didn't use the telephone and he didn't look up any number. He didn't put any money in the box. He left the booth and then the witness walked

in and found the package there." [R.T. 186]

This, then, is the sum total of the government's case as to what happened while Romero was in the phone booth.

Agent Downing further testified that after Romero left the phone booth, he, Agent Downing, went to the phone booth and underneath the phone he found a small package wrapped in tinfoil which he opened and found a brown powder [R.T. 170, 178-181]. Agent Downing stepped out of the booth, gave a "pre-arranged signal" and the other agents commenced the arrest procedure [R.T. 171]. When and why there was a "pre-arranged" signal is not disclosed by the record.

It is of paramount importance to note that the agents did not know that Romero was going to go to a phone booth and that the phone booth involved was neither searched nor under surveillance before Romero entered the phone booth. Agent Downing testified:

"Q. Agent Downing, did you search the phone booth before the defendant Romero went into it?

A. No, sir, I did not. [R.T. 178]

. . .

Q. Agent Downing, how long had you had this phone booth under surveillance before

Mr. Romero --

A. I didn't know where he was going when I saw him walking.

Q. What I am trying to say, Agent Downing, how long were you watching that area before --

A. I had been there just a short period. I would say two or three minutes." [R.T. 187-188]

At this time in the chronology of events, the agents did not know what was in the package. And they did not know what was in the package until after Romero was arrested. They did not even perform a field test on the brown powder until after Romero was arrested. Agent Downing testified:

"Q. Did you subsequently at any time perform a field test?

A. Much later. I did not.

Q. Did you observe one performed?

A. I did.

Q. What was the reaction?

A. Positive reaction or opium derivative.

Q. This is the Marquis reagent test?

A. Marquis reagent test." [R.T. 170-171]

The evidence has now been reviewed, and the first issue is now clear: did the agents have probable

cause to arrest Romero? Essentially, the agents were suspicious of Romero over a six-month period; one agent saw him enter a phone booth and leave; one agent entered the booth and found a package of brown powder; no one saw him in possession of the package; no one saw him put the package in the booth; no one had seen or watched the booth prior to his entering the booth; no one had tested the brown powder; and we conclude that no one had probable cause to arrest Romero.

The events after Agent Downing gave his signal were related by Agent Saiz, who testified that he saw Romero enter a phone booth for a minute or less [R.T. 215] saw Romero return to his vehicle and just sit in it for a few minutes in view of the booth while Downing entered the booth, left the booth and then signalled [R.T. 216]; Romero, who is situated so as to see all of this, then started to drive away [R.T. 216]; Agent Mendelsohn in his car (the same one Downing had been in) then radioed Saiz and his partner, Watson, to arrest Romero [R.T. 217]. Then, according to Saiz, within a few blocks of the telephone booth, the following events took place: the agents pulled their vehicle alongside of Romero's and flashed a badge and told him to pull over; Romero's car sped up, tried to take a corner, spun out of control and stopped, and the agents hit him over the

head with a gun barrel, shot out one of his tires, and arrested him [R.T. 217-219]. The agents were in plain-clothes as they have no uniforms, and their cars are plain, unmarked cars and the time was about dusk, 6:30 on a May 10th evening.

Appellants have tried to set forth all of the salient evidence of probable cause to arrest Romero for a violation of the federal narcotics law; and in so doing, conclude that there is no probable cause to arrest - suspicion, yes, but probable cause, no. Appellants, later in this brief, will argue the sufficiency of the evidence to convict Romero on count one, but wish to point out here that this is the sum total of the evidence on both the issue of probable cause to arrest and the proof of guilt beyond a reasonable doubt that Romero received, concealed and facilitated the concealment and transportation of the brown powder found in the phone booth. Obviously, if upon these facts there is no probable cause to arrest, then on the same evidence there cannot, as a matter of law, logic and reason, be sufficient evidence to convict. Additional arguments on these facts are presented later herein on the question of the sufficiency of the evidence to convict Romero on count one of the indictment.

B. Romero's statements at the time of his arrest are not admissible into evidence as his arrest was illegal, the statements were not voluntary, he was not properly warned of his constitutional rights, and the statements were obtained during a period of "unnecessary delay."

1. Preliminary statement.

We think it is important at the outset to distinguish the three separate and distinct legal occasions when Romero's postarrest statements were utilized: first, in the agent's affidavit to obtain a search warrant of Tickle's home; second, at the hearing on the motion to suppress evidence; and third, possibly at the trial on the merits.

2. Romero's arrest, warning and statement.

There is a sharp conflict in the evidence as to the conduct of the agents when they arrested Romero. The arresting agents testified that when Romero's car spun out of control and stopped with its motor dead, they approached his car with drawn guns and Romero resisted arrest, which necessitated an agent shooting out a tire on Romero's car and then smashing his gun barrel onto Romero's head and hitting Romero with his fist. [R.T. 209-211, 219-222, 289]

Two disinterested witnesses, Mrs. Zimmer and Mr. Alger, who live at the scene of the arrest, testified that once Romero's car stopped, it never moved again, and that the agent beat Romero as he was stepping out of his car, and that Romero was not struggling or fighting when he was smashed over the head with a gun [R.T. 232-243]. It would appear that the agents' testimony on this issue was seriously impeached. In any event, everyone is in agreement that Romero was severely beaten on and about the head, that he nearly feel to the ground, that he was bleeding from a head wound with sufficient profusion that his face, neck and shirt were all bloody [R.T. 201].

After Romero was arrested, he was handcuffed with his hands behind his back, placed in the back seat of his own car, and driven on the flat tire several blocks away to a gas station [R.T. 221-222]. On the way to the station, the agents gave him what is conceded to be an insufficient warning under Miranda vs. U.S., 384 U.S. 436, 86 S.Ct. 1602 (1966).

According to the testimony of Agent Mendelsohn, when Romero got to the gas station, Mendelsohn gave him a warning (which is also conceded to be insufficient under Miranda), and then Romero told him that if the agents were fair with him, he would be fair with

the agents and that the rest of the heroin was stashed at Tickle's residence [R.T. 193, 196].

The court said: "The warning that was given to Mr. Romero doesn't meet the Miranda standard, I do not think the government would contend that it does." And the government counsel replied: "No, I do not, your Honor." [R.T. 250] Now then, the issue is clear: what use, if any, can the prosecution make of an arrestee's statement that was obtained without giving the arrestee a proper constitutional warning? We think the law clearly states that no use can be made of such statements.

3. Securing the search warrant.

Agent Lipschutz was present when Romero was arrested at about 6:30 P.M. on May 10, 1966. As soon as Romero was arrested, Agent Lipschutz left the scene of the arrest, drove to downtown Los Angeles, met with an Assistant United States Attorney, arranged to have the United States Commissioner come back to the federal building, prepared a search warrant and affidavit in support of the search warrant, took them before the United States Commissioner, and when the search warrant was issued, he returned to the area where Romero was still being held by other agents [R.T. 95-97, 130-133]. Romero was not taken before the United States Commissioner

but while Agent Lipschutz was preparing his affidavit for the search warrant, Agent Mendelsohn telephoned him and advised him that Romero had made the statement, "That if they would be fair with him, that the heroin was in Tickle's house," and Agent Lipschutz put this exact statement in his affidavit for the search warrant [R.T. 96, 133] [C.T. 51]. This, then, was the first time the government used this statement obtained from Romero.

4. Romero's arrest was illegal; therefore, this statement is not useable by the government.

If this court agrees that when the agents arrested Romero without a warrant, they lacked probable cause and, therefore, his arrest is illegal, then the only permissible conclusion that can be legally drawn is that Romero's statement is totally suppressible as unlawfully obtained evidence.

Wong Sun v. U.S., 371 U.S. 471, 83 S. Ct. 407 (1963).

The clear holding of the Wong Sun case is that verbal evidence immediately derived from an unauthorized arrest is the "fruit" of official illegality and cannot be used by the government.

See also: Collins v. Beto, 348 F.2d 823

(5th Cir. 1965);

Gatlin v. U.S., 326 F.2d 666 (D.C. Cir. 1963);

Bynum v. U.S., 262 F.2d 465 (D.C. Cir. 1958).

5. Romero's statement should be suppressed as it was not voluntary.

As we pointed out above, Romero was beaten, bleeding, handcuffed and in custody, and within minutes thereafter he made a statement that can be construed as an admission or a confession. The problem of physical violence preceding a confession was dealt with by this court in Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), wherein the court stated in reiterating and partially quoting the opinion of Justice Jackson in Stein v. New York, 346 U.S. 156 (1952), "Physical violence or the threat of it automatically invalidates confessions, and in such cases, there is no need to weigh or measure its effects on the will of the individual victim."

Payton v. U.S., 222 F.2d 794 (D.C. Cir. 1955) is a remarkably similar case to the instant one and that court ruled that the confession was inadmissible. See also Fikes v. Alabama, 352 U.S. 191, 198 (1957).

6. It is conceded that Romero was given an inadequate constitutional warning, and thus Romero's statement is excludable.

In the Miranda case (supra), the court held

that unless and until the prescribed warning is given, no evidence obtained as a result of interrogation can be used against the person. The government very properly conceded that it could not use Romero's statement at the trial on the merits [R.T. 204]. And the court several times during the hearing on the motion to suppress evidence, including these statements, commented on whether or not this statement was admissible at either the hearing on the motion or at the trial on the merits, but the court denied the motion to suppress and upheld the search warrant, and still admitted this statement into evidence at the trial on the merits [R.T. 252-255, 260-263].

7. Romero's statement is excludable because it was obtained during a period of unnecessary delay under Rule 5(a) Federal Rules of Criminal Procedure.

After Romero was arrested, an agent at the scene of the arrest was able to go and appear before a United States Commissioner and secure a search warrant by utilizing a past arrest statement of Romero, but Romero was not taken before that same Commissioner. This is a classic case of a violation of Rule 5(a), and the United States Supreme Court has clearly spelled out the legal consequences of such delays.

Mallory v. U.S., 354 U.S. 449, 77 S.Ct. 1356 (1957), does not permit the use of any statements obtained during a period of unnecessary delay. The rule of the Mallory case not only applies to the statements made to Agent Mendelsohn but a fortiori to Romero's statements made at the time of the search of Tickle's home.

See: Spriggs v. U.S., 335 F.2d 283 (D.C. Cir. 1
Greenwell v. U.S., 336 F.2d 962 (D.C. Cir. 1964)

8. Romero's statement is not to be used at all, even in the affidavit for the search warrant.

The Supreme Court in Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 40 S.Ct. 182, as requoted in the Wong Sun case, explicitly stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like

any others, but the knowledge obtained by the Government's own wrong cannot be used by it in the way proposed." (p.183)

Here we have statements obtained from Romero that are not admissible for any purpose for any one of the following reasons:

(a) He was arrested without probable cause, and his statements thereafter are illegally obtained; Wong Sun;

(b) He was beaten and bloody and handcuffed, thus his statements are not voluntary;

(c) He was not properly warned and thus his statements were obtained by violating his rights under the Fifth and Sixth Amendments to the Constitution; Miranda;

(d) He was not promptly arraigned after his arrest and his statements were obtained during a period of unnecessary delay, and thus are excluded; Mallory.

For any one of these reasons, standing alone without the other three, the court should have rejected Romero's statements.

C. There is insufficient evidence to support a conviction of Romero on count one of the indictment.

We have carefully and perhaps laboriously reviewed

all the evidence the government presented on the issue of whether there was probable cause to arrest Romero, and we will not repeat it again here. This evidence was presented on the hearing on the motion to suppress evidence, but when said motion was denied the parties agreed to waive jury and submit the matter to the court on the evidence presented at the hearing on the motion to suppress [R.T. 259].

The trial court during the hearing on the motion to suppress summarized the evidence at one time as follows:

> "THE COURT: I don't agree with you. It seems to me that here we have a man who purportedly has made some voluntary statement that ties him into this drop of narcotics.
>
> No one has testified that he saw Mr. Romero with a package in his hand prior to the time that he entered the phone booth. No one knows what was in the phone booth, if anything, prior to the time that he entered it. They didn't know he was going to be in there.
>
> After he went in there, they went in and found this heroin there. This doesn't necessarily mean that he is the one that dropped

that heroin there. It's a long way from any proof of that.

However, now, in order to show that he did, you tender a statement which purportedly is a voluntary statement. You advised him of his rights and so forth. At the time he made the statement, he had blood on his head, face and shirt, and he had been arrested.

MRS. DUNNE: Yes.

THE COURT: Maybe, as far as I know, beaten to a pulp." [R.T. 200-201]

In spite of this relatively accurate summary of the evidence and in view of the fact that the government had no additional evidence on count one, the court still convicted Romero. If Romero's statements to Agent Mendelsohn are in fact and in law not admissible at the trial on the merits, then clearly there is insufficient evidence to convict. And the court, in its summary above and in its later review of the evidence when it agreed to accept the jury waiver, indicated that it would receive Romero's statements into evidence at the trial on the merits [R.T. 261-263]. And again, the court, when it reviewed the evidence prior to rendering its finding of guilt, stated: "I think that his statement was admissible" [R.T. 368]. Thus, we have a

situation wherein the government had agreed with the defense that these statements were not admissible at the trial, yet the court accepted them into evidence. Obviously, if these statements are not admissible, there is not enough evidence to prove beyond a reasonable doubt that Romero "received" the heroin found in the phone booth, or that Romero "concealed" said heroin (it was not in fact concealed in the phone booth, according to Agent Downing's testimony), or that Romero "facilitated the concealment and transportation" of said heroin.

What if some other person had entered the phone booth after Romero - would he be guilty of the same charge? The government offered no evidence as to the presence or absence of fingerprints on the tinfoil wrappings of the heroin.

In order to establish the guilt of Romero, the government had to be relying on the presumption contained in 21 U.S.C. §174:

> "Whenever on trial for a violation of this section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the

satisfaction of the jury."

There is no proof that Romero ever possessed the heroin found in the phone booth. Proximity is not possession. All the government proved was that Romero was in a phone booth where they subsequently found some heroin. The phone booth was neither searched nor watched prior to Romero's entrance into it, and the booth is located some ten to fifteen feet from the entrance to a bar.

The agents were suspicious of Romero, they had been "working him" without success for some six months, they were probably frustrated, they were out that evening "en masse," they were looking very hard for something - anything to confirm their suspicions, and they were blinded by their own eagerness.

Isn't it a perfectly reasonable hypothesis on the evidence viewed in the light most favorable to the government to conclude that Romero was to go to the phone booth to pick up the heroin, but with all the agents around he became leery or suspicious and refused to pick it up; instead, he returned to his car and waited, and when Downing went it the booth, Romero left.

See: Bolen v. U.S., 303 F.2d 870 (9th Cir. 1962).

The government must prove possession of the heroin, and here there was a total failure of such proof. Possession here means personal physical custody and control; or stated another way, it means under one's control or dominion.

Hernandez v. U.S., 300 F.2d 114 (9th Cir. 1962).

The mere presence in the vicinity of narcotics or the mere knowledge of physical location of narcotics does not in and of itself prove possession.

Rodella v. U.S., 286 F.2d 306 (9th Cir. 1960);

U.S. v. Landry, 257 F.2d 425 (7th Cir. 1957).

An objective review of all the admissible evidence on the issue of guilt can only lead to the conclusion of not guilty.

D. The search warrant is legally invalid as it does not set forth probable cause; it is also invalid as it uses as part of its probable cause illegally obtained statements from Romero.

Agent Lipschutz secured a search warrant for Tickle's home. The court ruled that the warrant was valid. The court questioned Romero's standing to challenge the search warrant. The court said:

"The search warrant has another point which I do not think anyone has raised, but I will

mention it. While the house belongs to Mr. Romero, at this point he is not the occupant of it. There is a question raised in my mind as to whether or not he would have standing to object to a search under those circumstances. If he has no standing to object to a search, then he would have no standing to object to the basis of the search warrant or otherwise. If he contended that it was his home and that it was his material that was picked up and so forth, which I think probably he would not want to contend, then the circumstances might be different." [R.T. 262-263]

1. Romero has standing to contest the validity of the search warrant and the search of Tickle's home.

Romero was charged, tried and convicted of receiving and concealing the heroin that was found in Tickle's home, and further, he owned the home. The government did not contest Romero's standing to object. The trial court was clearly in error on this point. Jones v. U.S., 362 U.S. 257, 80 S.Ct. 725 (1960).

2. Romero's statement in the affidavit for the search warrant renders the search

warrant invalid.

The affidavit for the search warrant recites that Romero said to Agent Mendelsohn: "That if they would be fair with him, that the heroin was in Tickle's house."

We pointed out above that the Supreme Court in the Silverthorne case (supra) clearly forbade the government from making any use of illegally obtained evidence.

To dramatize the point, just assume that Romero had said: "The heroin was in Tickle's house" over the telephone, and that the federal agents had illegally wiretapped his telephone and had intercepted this statement. Could it be used to secure a search warrant? Clearly: no. Here there are four different and separate legal reasons why Romero's statement is illegally obtained, and any one of them is sufficient in and of itself to totally prohibit the government from using this statement in the affidavit to secure a search warrant.

If this statement were not in the affidavit, then there is no probable cause that there is heroin in Tickle's house and the search warrant would be insufficient on its face. Appellants would expect the government to concede this point.

3. The search warrant is insufficient on

its face as it does not establish probable cause.

The affidavit in support of the search warrant is so carelessly drawn that this alone should render it invalid. Note the following: the search warrant itself is dated the 3rd of May, 1966, and the 3rd is lined out and a "10" written in above it, and no initials anywhere; the same obliteration appears on the affidavit except there are two unidentified initials under the scratchout; the printed form "Affidavit for Search Warrant" contains the typed-in statement: "See attached affidavit," and it does not say whose affidavit is attached, and in fact there is no affidavit attached - merely a typed statement that is nowhere sworn to or properly incorporated by reference; the attached typed statement has no ending - no period at the end of the last sentence and no signature of any kind; and this attached typed statement even has an "etc." in it at the critical point of what rights Romero had been advised he possessed.

Perhaps the agents tried to obtain a search warrant on May 3, 1966, and were turned down because of a lack of probable cause. In any event, the government - its agents, attorneys and Commissioners - should be held to a higher degree of competence when

it involves securing a search warrant for the search of a man's home.

An analysis of what is contained in the search warrant may be somewhat repetitive of our analysis of the evidence of probable cause to arrest Romero; however, a brief review will be of assistance.

The first paragraph refers to the letters from the anonymous Juan Sanchez. However, there is some candor lacking as it states that Juan Sanchez is a "Mexican National" and the affiant testified at the hearing that he had no idea who Juan Sanchez was; also the dates (September and November, 1965 - some six months prior to this affidavit) on the letters is not provided.

The second paragraph recites Romero's former conviction eight years before the date of the affidavit, and his pending appeal (which this court reversed on stipulation of the parties).

The third paragraph deals with telephone records relative to the telephone in Romero's residence. It overstates and is inaccurate when it states that: "A toll check of Romero's residence phone disclosed numerous calls to at least twenty people who are of record with this office and who have narcotic convictions." All that the toll check could show is

that a number was called; it is this type of exaggeration that leads to errors. This paragraph also mentions that Tickle used Romero's credit card in Oakland in December, 1965, (five months before) to rent a car which was returned by Toliver, and that an informant stated that "Toliver had received his narcotic supply that day from the person in the rented vehicle." Nothing more is said about this informant. We are not told: whether he is reliable or not, what the basis of his information was, was he a witness, who the informant gave this information to, or even who was the person in the vehicle. The value of this type of statement for probable cause is, of course, nil, but why is it in the affidavit?

The fourth paragraph recites the surveillance of Romero, but it does not give any dates. It further recites that there were twenty-five to thirty telephone calls from Romero's residence to Tickle's residence, but it does not say in which time period; nor does it disclose what the agent knew: that Romero was Tickle's landlord, and that Romero's family and Tickle's family were related. This paragraph also states that on March 21, 1966, (nearly two months before the affidavit) a truck was seen at Tickle's home, the plates of which showed the truck was "checked out to Manuel Arrellanes,

who is the person mentioned in the letters from Juan Sanchez." Now, this is just not true. Nowhere in the affidavit is there any mention of any names in these letters, but what is worse is the fact that the letters say Areyano, not Arrellanes. The affidavit also fails to disclose that Romero's wife's name is Arrellanes.

If the affidavit stopped at the end of the fourth paragraph, there would be no issue here as there would not have been a search warrant. Up to this point all that is set forth is suspicion; there is no probable cause that there are narcotics in Tickle's home.

The fifth and last paragraph provides as follows:

> "On May 10, 1966, at about 5:20pm, ROMERO arrived in his 1966 Cadillac at TICKLE's residence and entered later he left and was followed by Agents to the SW corner of Meeker and Garvey where he was observed to enter a phone booth whose telephone number I was told by Agent Mendelsohn is 448-9261. He appeared to leave something near the phone as he made no call. He left returned to his car and sat in it. Agent Downing upon instructions, entered the booth and retreived a tin foil package

which contained heroin (field test). ROMERO observed this and left hurriedly in his car. He was overtaken after swerving his car and attempting to flee on foot. I have been told by Agent Mendelsohn that ROMERO stated to him after being advised of rights, etc., that if they would be fair with him that the heroin was in TICKLE's house "

The first sentence fails to disclose the time Romero entered the phone booth, and how Agent Mendelsohn obtained the telephone number in the phone booth and relayed it to the affiant is never made clear. The second sentence is not true. No one saw Romero leave something near the phone, and what the affiant does not state is that he didn't even see Romero in the phone booth, but another agent did. It sounds as if the affiant was watching the booth, which he wasn't. What is the meaning of "appeared?" Does it follow that because no call was made that it appeared something was left in the booth?

The sentence about Agent Downing is not true. It states that Downing "retreived a tin foil package which contained heroin (field test)," and Agent Downing did not field test the contents of this tin foil

package. In fact, Agent Downing testified that someone else performed the field test at a time "much later" than when he picked up the package [R.T. 170-171]. Thus, at the time of this affidavit the truth apparently was that the agents had a tin foil package that contained an unknown brown powder.

The next statement: "Romero observed this and left hurriedly in his car," is a conclusion drawn by someone not present. What did Romero observe? The field test? Where was Romero in relation to the phone booth at this time, and what does "left hurriedly" mean?

The next sentence is also inaccurate as the evidence clearly showed that Romero never attempted to "flee on foot." But this same sentence does state that Romero was "overtaken." Thus, the United States Commissioner would know that Romero had been arrested. Of course, the final sentence (if indeed it is a sentence) conclusively establishes for the Commissioner that Romero is in federal custody. What does the statement attributed to Romero: "If they would be fair with him that the heroin was in Tickle's house" mean within the framework of this affidavit for a search warrant of Tickle's house? What heroin <u>was</u> in Tickle's house? The only heroin mentioned in the affidavit is

the "heroin" from the phone booth, and even if that "heroin" had been in Tickle's house that does not establish probable cause that there was then and there any heroin in Tickle's house. The Commissioner was not told about shooting out the tire and smashing a gun barrel over Romero's head before Romero made the statement to Mendelsohn. And what does "if they would be fair with" Romero mean in this context? Does it follow that they had not been fair up to that time? Does the statement also mean that if they were not fair with Romero then the heroin was not in Tickle's house? At the very least, the Commissioner should have ordered the agents to bring Romero before him immediately before he would issue such a search warrant.

The lengthy recital in the affidavit does not add up to probable cause to justify the issuance of the search warrant. As Justice Douglas said in his dissenting opinion in U.S. v. Ventresca, 380 U.S. 102 (1965):

> "The present case illustrates how the mere weight of lengthy and vague recitals takes the place of reasonably probative evidence of the existence of crime."

In passing on the validity of the search warrant, only the information set forth in the warrant may

be considered.

Giordenello v. U.S., 357 U.S. 480 (1958).

The leading case on the validity of an affidavi in support of a search warrant is Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1514 (1964), wherein the court said: "The Court must still insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for the police."

If it is the government's intention to treat Romero as an informant for purposes of the search warrant, then the Aguilar case would clearly outlaw this on grounds of reliability. But, Romero is not an informant; he is an arrestee who had been beaten, inadequately warned of his constutitional rights, and deprived of a prompt arraignment before a judicial officer.

This search warrant is legally defective and the ensuing search is illegal. The evidence obtained from this search is inadmissible and both appellants should be acquitted on this count. There is no other basis to support the search of Tickle's home. The government has never contended that either Tickle or Romero consented to such a search, and the evidence is clear that they did not consent to such a search.

E. Romero's statements and actions at Tickle's home during the search of

Tickle's home are inadmissible as evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a proper prior constitutional warning; and they were obtained during a period of unnecessary delay.

After Romero's arrest, an agent left the scene of the arrest and secured a search warrant. Romero was kept in the field rather than arraigned. The agents executed the search warrant as follows: they entered Tickle's home, Tickle told them that he would show them "where Dave keeps it," Tickle showed them a bag that, when searched, contained nothing of a narcotic nature, the agents started searching the entire place and found nothing, other agents brought Romero into the house and he told them that "the package is up under the sink." [R.T. 386-388].

There is no need to belabor the points made earlier in reference to Romero's statement to Agent Mendelsohn; each of them applies to his statements and acts in Tickle's home, and each of them invites only one conclusion: that these acts and statements

are inadmissible for any purpose.

Even the trial court indicated that it did not think that either Romero's or Tickle's statements at the time of the search were admissible in evidence [R.T. 255, 256].

F. There is insufficient evidence to support a conviction of appellants on count two of the indictment.

1. The evidence as to Romero on count two is insufficient.

Romero's statements to Agent Mendelsohn and his acts and statement to the agents searching Tickle's home provide the only evidence that Romero received or concealed the heroin found in Tickle's home. These statements are not admissible evidence, and as soon as this court reaches that opinion, then the conviction on count two must be reversed. Naturally, if this court concurs that the search warrant is legally insufficient, then there is no legal evidence of the violation of law charged in count two and the conviction on count two would be reversed.

2. The evidence as to Tickle on count two is insufficient.

The total evidence relative to Tickle falls into three categories: Tickle's statements to the

agents searching his home; the heroin found in Tickle's home; and Tickle's confession. If the search of his home is illegal, as we contend, the case is over.

It is important to establish the chronology of events with Tickle.

Agents arrived at Tickle's residence at 8:30 P.M. on May 10, 1966 [R.T. 386]. Agent Lipschutz told Tickle "he didn't have to say anything" and then proceeded to ask Tickle if he had any narcotics at the residence [R.T. 387]. Tickle said, "I'll show you where Dave keeps it," and then proceeded with Agent Lipschutz to a back hall closet area. At that point, Tickle showed Lipschutz a black briefcase and stated, "That's where Dave keeps it." [R.T. 387] Agent Lipschutz opened the briefcase and searched it but found nothing of a narcotic nature [R.T. 387]. After this occurred, the other agents started searching the premises and curtilage [R.T. 388].

Shortly thereafter, other agents arrived with David Romero [R.T. 388]. Romero told Tickle that he, Romero, was going to cooperate and Romero said to the agent that "the package is up under the sink." [R.T. 388] Agent Lipschutz reached up where Romero had instructed him to and retrieved the package wrapped in black electrician's tape. He opened the package and it

contained opium [R.T. 388, 389].

Tickle was arrested on May 10, 1966, and he was arraigned before the United States Commissioner on the morning of May 11, 1966 [R.T. 390, 391] at which time he was represented by counsel.

Tickle was apparently not advised that he was arrested until after the heroin was found, but query what if as the agents entered his home with the search warrant he had tried to leave his own home? In any event, the initial warning given to Tickle was not a proper constitutional warning per Miranda (supra). It would appear that if when a man is arrested that he must be properly warned before his statements could be used against him, then a man whose home is suddenly invaded by agents with a warrant to search his home for contraband should also be properly warned. Tickle's statement is not a volunteer's comment; it was given as an answer to the searching agent's question.

In order to convict Tickle on count two, the government had to prove that Tickle possessed the heroin and the government's own evidence is that Tickle not only did not possess the heroin but he did not know where it was, even though it was in his own home.

Romero owned the house; Romero had been seen at Tickle's house many times [R.T. 408]; Romero had a

key to Tickle's house; Romero had been seen coming out of Tickle's house several hours before the search of the house; and Romero and Tickle are related. The government never proved that Tickle possessed the heroin found in his house; in fact, the government proved that Tickle didn't know where the heroin was located, and that they themselves couldn't find it, and that Romero was the only one who knew where it was located.

G. The search warrant for Tickle's home is legally invalid as to Tickle.

There is no question that Tickle has standing to challenge the search warrant which authorized a search of his home. What we said above in reference to the invalidity of the search warrant applies equally here to Tickle.

H. Tickle's confession was obtained in violation of his constitutional rights: it was obtained by a denial of due process and fair play; it was obtained by denying him his right to counsel; and it was the product of an illegal search of his home.

On May 11, 1966, Tickle was represented by private counsel at his arraignment before the United States Commissioner. Prior to Tickle's indictment, Tickle's attorney advised Agents Mendelsohn and Theisen,

the agent in charge, that he was representing Tickle [R.T. 445, 446]. Between Tickle's arrest on May 10, 1966, and his indictment on August 3, 1966, Tickle was at liberty on a $2,500 personal surety bond [C.T. 10].

On August 3, 1966, Tickle was indicted; and at the government's request (without advising the court that Tickle had already been arrested and had posted bail on the charge for which he had been indicted), the government asked for a new warrant of arrest for Tickle and that bail be set at $15,000 [C.T. 14-16, R.T. 391]. That same night the agents went to Tickle's home and arrested him. [R.T. 391, 392] The agents took Tickle to their office and interviewed him in the absence of counsel [R.T. 393]. The agents knew that Tickle had counsel [R.T. 397]. That night they kept Tickle in the Monterey Park jail rather than the usual Los Angeles County Jail [R.T. 397, 398].

On the following morning, August 4, 1966, the agents again brought Tickle to their office where they warned him, interrogated him, and obtained a signed confession from him [R.T. 398-404; Ex. 2,3]. During the course of the interrogation and prior to obtaining the confession the following events relative to Tickle's bond occurred: Tickle advised the agents he couldn't make a $15,000 bond, and the agent said that he would

speak to the United States Attorney about a reduction; on the morning of the 4th, the agent spoke to his superior, Mr. Theisen, and then to the United States Attorney's office, requesting they arrange for a bond reduction; the agent told Tickle that the United States Attorney would recommend a bond reduction; the United States Attorney's Office, apparently on behalf of Tickle, made a written motion to reduce Tickle's bond to $2,500 personal surety bond on the grounds that "The Government feels that the $2,500 personal surety bond is sufficient to guarantee the defendant's appearance at the time of trial;" the court, still ignorant of all the intrigue, granted the government's motion; and Tickle signed a confession prepared and typed by the agents [R.T. 425, 428, 429, 529; C.T. 6-7].

Also during the course of this interrogation on August 4, 1966, in the agents' offices, the following events relative to Tickle's attorney occurred: Tickle's attorney, known to be such to the agents, telephoned the agents and told them to stop interrogating his client, Tickle, and that he was on his way down [R.T. 509]; minutes later, Tickle's attorney came to the agents' office, was kept waiting fifteen or twenty minutes and was then allowed to see Tickle in the presence of four agents, at which time Tickle told him he had another

attorney and did not want to talk to him [R.T. 426-427, 440-444, 508-511]; thereafter, Tickle signed the confession and was released on bond.

We have intentionally omitted what Tickle testified to regarding what the agents told him about attorneys so as to present this in the view most favorable to the government.

The trial judge, who was the same judge that had issued the warrant upon the return of the indictment and set the bail for Tickle at $15,000, when he became aware of the tactics outlined above, said:

> "But, now, here is the situation, and I might as well state it right now. I think that it is reprehensible that the Government will go out and pick up somebody, as in this case, bring him before the United States Commissioner and have a hearing where the Commissioner, after the case has been presented to him on a complaint -- after the Commissioner has released the man on a $2,500 personal recognizance bond, then, of course, he is released. He also is represented by an attorney.
>
> What the relationship between that attorney and the defendant is is a matter

which ordinarily is a matter of confidential relationship. And as far as the Bureau of Narcotics or any other agent of the Government and the United States Attorney is concerned, that man continues to represent the defendant until they are told to the contrary.

It may be that there is no opportunity, as in this case, to render any order or to record any appearances except with the Commissioner which would fix or settle this matter.

In this case it happens that the record shows, but the Bureau of Narcotics didn't know it. This is on the report made before the Commissioner, which was filed August 19, 1966: 'Richard Sherman, preliminary only, first presentment.' But it shows that he represented Ronald Tickle.

That may be there, but I do not know that that necessarily ends the relationship of Mr. Sherman and Mr. Tickle.

On August 15th there was filed by the clerk, and apparently signed by both Mr. Tickle and Mr. Sherman, a designation of counsel and

appearance praecipe. I am sure this came before.

It was after this that Mr. Sherman presented to the court that he and Mr. Tickle had had some disagreements with respect to this matter. In fact, it was when it was coming up for trial, and we had to postpone it in order to let Mr. Tickle get other counsel.

This is how we stand in this particular case and undoubtedly in many other cases. But it has never come so forcibly before me as this.

A man is arrested. He is represented by counsel. He is taken before the Commissioner. There is a complaint there which charges what subsequently turns out to be the very same charge as is charged in the indictment. The Commissioner lets him out on a $2,500 bond. The Bureau of Narcotics then recommends a twenty or fifteen thousand dollar bond to the U.S. Attorney. The United States Attorney has this information available, too. They recommend this to the court at the time that the Grand Jury returns the

indictments as presented.

Here is the record of that.

It came before me that a warrant should be issued for this man's arrest, which indicates to me that this man has not yet been arrested. Nothing is said to me that he has been arrested and released on bail in an amount the Commissioner thought was reasonable in view of all the circumstances,

But they set a $15,000 bail and asked that a warrant be issued.

I know that I inquired about this bail, because I note here in the second case, Pool and Utterback, I reduced their bail from $500 to $200, and I put my initial on it.

When it came down to this case I remembered it, and I asked why these bails were so high. They made a representation to me as to why they were so high, but never disclosed that Mr. Tickle had been arrested, brought before the Commissioner and released on a $2,500 surety bond, or that he was represented by counsel.

Now, then, with that they go out and

arrest him again, obviously, to me, the way I see it now, so as to have him under arrest and be able to question him and possibly without his attorney. They do not notify the attorney.

So Mr. Tickle continues. They interrogat him. Then they promise big-heartedly that they are going to reduce his bond when they know that the chances are that if anyone would come and make a bond reduction, and had Mr. Sherman known on the 3rd that Mr. Tickle was in custody he undoubtedly would have gotten a bail reduction to the $2,500 OR and he would have been out.

This is not in keeping with the laws of the United States. It is not in keeping with the new Bail Act, and I hope that this practice is going to cease now.

I am going to address a letter to all the rest of the judges of this court and suggest that we adopt a rule which will require that every time a return of a Grand Jury indictment is made, that the judge be advised as to whether or not the person has heretofore been arrested on this charge or

a similar one so that this can come to the attention of the court.

That is the reason I asked these questions.

MRS. DUNNE: Yes, sir.

THE COURT: Whether or not Mr. Tickle's constitutional rights have been violated or not is something that I have to give further consideration to." [R.T. 540-544]

The court was totally justified in its anger and observations; but the court still admitted Tickle's confession into evidence and found him guilty.

The federal appellate courts have supervisory authority over the lower courts administration of the laws and rules of evidence, and in this instance it should be exercised strongly and vigorously by throwing this confession out.

Weeks v. U.S., 232 U.S. 383, 34 S. Ct. 341 (1914);

Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359 (1949);

Kerr v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963).

On these facts, it is also clear that Tickle was denied his constitutional right to have counsel.

There is no clear unequivocal waiver of counsel on these facts, and indeed there couldn't be as Tickle had counsel and the agents knew it all the time.

The final obvious point is that but for the search of Tickle's home, which we contend was illegal, there would not have been a confession.

VI

CONCLUSION

The appellants respectfully urge this court to reverse the convictions as to both appellants with orders that the case be dismissed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas R. Sheridan

THOMAS R. SHERIDAN